

FACTSHEET

TITLE: **SPECIAL PERMIT NO. 1165B**, an amendment to Special Permit No. 1165A, requested by Ray Lineweber, to preserve the landmark Noble-Dawes House (d/b/a Billy's Restaurant) including a revised site plan and to increase the property covered by the special permit to include all of Lots 5 and 6, Block 150, Original Plat, on property generally located at the southeast corner of 13th and H Streets (1301 H Street).

SPONSOR: Planning Department

BOARD/COMMITTEE: Planning Commission
Public Hearing: 3/21/01 and 4/04/01
Administrative Action: 4/04/01 and 4/18/01

RECOMMENDATION: **DENIAL** (5-3: Krieser, Schwinn, Newman, Duvall and Bayer voting 'yes'; Carlson, Steward and Taylor voting 'no'; Hunter absent).

STAFF RECOMMENDATION: Conditional approval, as revised.

FINDINGS OF FACT:

1. The Planning staff recommendation to approve this amendment to Special Permit No. 1165A, with conditions, is based upon the "Analysis" as set forth on p.3-5, concluding that the applicant's request to fence his property is reasonable if viewed solely from the perspective of the landmark Noble-Dawes House, but LMC 27.63.400 also requires the City Council to consider (and the Planning Commission to offer advice upon) the impact of the proposal on the surrounding area, and the public benefit of granting the request. The impact of separating the lots, necessitating additional driveways and pavement while accommodating fewer parking stalls, seems to be adverse. However, those impacts come from implementation of an approved (and expired) building permit by a neighbor. While a joint operating agreement would be preferable to implementation of the applicant's proposal and reconstruction of the adjacent parking lot, the City cannot require neighbors to "just get along" and cooperate in the use of their property. Barring a joint operating agreement, there appears to be a public benefit of allowing the proposal and permit to be implemented as a step towards resolving the dispute.
2. This application had two public hearings before the Planning Commission. The applicant's testimony is found on p.7, 10-11, 12, and 14. The applicant's submittal is found on p.021-025. The site plan approved with Special Permit No. 1165A in 1986 is found on p.026-027.
3. Testimony in opposition is found on p.7-8 and 12-14. Proposed amendments to the conditions of approval submitted by Mark Hunzeker on behalf of Mark Becker, are found on p.033. The record also consists of five letters in opposition (p.034-040). The applicant's response to the letter in opposition from G. Bruce Kevil is found on p.041.
4. The initial public hearing was continued at the request of the applicant to pursue further efforts to resolve the issues with Mr. Becker. At the continued public hearing on April 4, 2001, the applicant advised that those efforts were not successful and requested the Commission's approval.
5. On April 4, 2001, a motion to deny failed 4-3 (Krieser, Hunter, Newman and Schwinn voting 'yes'; Carlson, Steward and Taylor voting 'no'; Bayer and Duvall absent); and a motion for conditional approval failed 3-4 (Carlson, Steward and Taylor voting 'yes'; Krieser, Hunter, Newman and Schwinn voting 'no'; Bayer and Duvall absent). Action was held over for two weeks. (See Minutes, p.16-17).
6. On April 18, 2001, a motion for conditional approval failed 3-5 (Carlson, Steward and Taylor voting 'yes'; Krieser, Schwinn, Newman, Duvall and Bayer voting 'no'; Hunter absent).
7. On April 18, 2001, the Planning Commission disagreed with the staff recommendation and voted 5-3 to recommend **denial** (Krieser, Schwinn, Newman, Duvall and Bayer voting 'yes'; Carlson, Steward and Taylor voting 'no'; Hunter absent). (See Minutes, p.17-18).
8. **Please note:** Due to a recommendation of denial, the Site Specific conditions of approval have not been completed and should be required if this application is approved by the City Council.

FACTSHEET PREPARED BY: Jean L. Walker

DATE: April 23, 2001

REVIEWED BY: _____

DATE: April 23, 2001

REFERENCE NUMBER: FS\CC\FSSP1165B

LINCOLN/LANCASTER COUNTY PLANNING STAFF REPORT

P.A.S.: Special Permit No. 1165B

DATE: March 8, 2001

*****REVISED: 3/21/01****

PROPOSAL: Ray Lineweber has requested an amendment to the special permit (SP1165A) to preserve the landmark Noble-Dawes House (dba Billy's Restaurant). Currently the special permit allows 50% of the floor area to be used for retail purposes and applies to all of Lot 6 and the west five feet of Lot 5, Block 150, Original Plat of Lincoln. This amendment would increase the property covered by the special permit to include all of Lots 5 and 6 of Block 150, Original Plat and would approve a revised site plan for the property.

GENERAL INFORMATION:

APPLICANT: Ray Lineweber
2942 Stratford Ave.
Lincoln, NE 68502
(402) 430-7103

CONTACT: same as applicant

LOCATION: Southeast corner of 13th and H Streets (1301 H Street)

REQUESTED ACTION: Amend (by extending the property and approving a revised site plan) an existing Special Permit (approved 1986) which allowed 50% of the floor area to be used for retail purposes, which amended the original Special Permit (approved 1985) which allowed O-1 uses on the property (which include some retail uses in 20% of the floor area).

ASSOCIATED REQUEST: None.

LEGAL DESCRIPTION: Lots 5 & 6, Block 150, Original Plat, Lincoln, Lancaster County, Nebraska.

EXISTING ZONING: R-8 (residential) and O-1 (office).

SIZE: 14,200 square feet, more or less.

EXISTING LAND USE: Restaurant and offices.

SURROUNDING LAND USE AND ZONING: Multiple-family residential, zoned R-8, to the south; parking lot (zoned R-8) and multiple-family residential (zone O-1) to the north; offices to the west (R-8) and to the east (O-1).

HISTORY: The Noble-Dawes House was built circa 1885 for photographer Henry E. Noble. The second owner of the duplex (and resident from 1891-1895) was Charles G. Dawes, later Vice President of the U. S. (1925-29) and recipient of the Nobel Peace Prize in 1925.

The house was designated as a Lincoln Landmark in 1985 and granted a special permit (SP1165) that same year, which authorized uses consistent with the O-1 office district. The next year an amendment to SP1165 increased the amount of floor area which could be devoted to retail uses from 20% to 50%, and "Billy's Restaurant" was established on the main floor. The site plan which accompanied SP1165A identified five parking stalls south of the building and five stalls east of the landmark, on land identified at that time as leased.

ANALYSIS:

1. The applicant now owns Lots 5 and 6. In their present configuration, the Noble-Dawes House occupies the western portion of the property, while the eastern portion is paved as parking and a driving aisle. The pavement continues onto the next property to the east, which also contains a former apartment building, converted to office use.
2. The parking stalls on the parcel to the east are currently accessible only from the driving aisle on Lot 5. The owners of the adjacent properties are in conflict over parking and access issues.
3. The applicant proposes to install an antique wrought iron fence at the east edge of his property, identical to fencing used elsewhere on his site. The fence would separate the adjacent properties. Reviewing the proposal from the perspective of the designated landmark, the Historic Preservation Commission found (February 15, 2001), that the proposed fence, within a turf strip, would be consistent with the character of the landmark and hence recommended approval of the special permit amendment.

The Building and Safety Dept. notes that a building permit was issued in Dec. 1999 (No. B9904056) for an 11-stall parking lot on the adjacent property (W. 35' of Lot 3 and all of Lot 4). That would provide diagonal parking and would require an additional one-way driveway off H Street. (Site plan enclosed.) That lot has not been constructed and by current regulations the permit expired after 6 months.

4. Lincoln Municipal Code Section 27.63.400 lists six considerations for landmark special permits, which to be granted to support preservation and reuse of historic structures:
 - (1) *The significance of the historic structure or site and the degree of variation sought from the permitted uses of the district;*
 - (2) *The extent to which economic factors necessitate the change in use;*
 - (3) *The extent of proposed exterior change to the structure or site;*
 - (4) *The impact on the surrounding area;*
 - (5) *The compatibility of the proposed use to the structure or site and the surrounding area; and*
 - (6) *The manner in which the public will be benefitted by such proposed use.*
5. The first issues, significance and degree of variation, were essentially answered in the prior designation of the house as a landmark, for its association with Charles G. Dawes and for its Queen Anne architecture, and in the approval of SP1165 in 1985 and SP1165A in 1986.

Since the proposal increases the area covered by the special permit but does not change permitted uses, the “degree of variation sought” does not appear to apply to this review. The only “variation” entailed in the present application is to incorporate an additional portion of O-1 property into the parking lot of a special permitted use.

6. The degree to which economic factors necessitate the requested change in use is subjective. The applicant’s letters accompanying the application argue that his use of his property is impeded by the present configuration of the parking lot.
7. No exterior change to the landmark property is expected under the proposal, but the adjacent parking lot would be divided at the property line into two lots and a fence would be constructed between them.
8. Key issues in the review of landmark special permits by Planning Commission are the interrelated items 4, 5, and 6 in LMC27.63.400--the impact on the surrounding area, the compatibility of the proposed use with the structure and the area, and the public benefit of the proposed use.

The proposal would impact the property to the east by forcing reconfiguration of the pavement on that property to make it accessible for parking. In turn, implementing the approved building permit for that parking lot would create an additional driveway off H Street. The proposal would also reduce the number of stalls presently available on the combined properties and the amount of green space on the east property.

The only public benefit potentially offered by approval of the proposal would be if separation of the parking lots helped resolve the dispute between the neighbors. Robert Frost in “Mending Wall” quotes a taciturn neighbor’s wisdom that “*Good fences make good neighbors,*” but for his part the poet observes:

*Before I built a wall I’d ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn’t love a wall.*

Obviously an amicable joint operating agreement for the combined parking lot would offer greater public benefit than the separated lots, as the present configuration offers more parking stalls, more grass, and less pavement. However, absent such an agreement, forcing the retention of the present arrangement requires the applicant to accept use of his property to access the parking stalls on the other property.

Lincoln Police Dept. staff have indicated to Planning staff strong concerns regarding this proposal, because the on-going dispute has generated service calls in the past. Planning staff has not yet received a written recommendation from Police Dept. on the proposal.

9. A memorandum of 3/6/01 from Rodger Harris of Building and Safety Dept. notes that the proposal states some of the 23 stalls within the proposed special permit property are rented to off-site users, and questions how many of the stalls are available to the Noble-Dawes House

uses. Elsewhere in his proposal the applicant notes that 10 stalls are so rented, presumably leaving 13 for the landmark property. SP1165A of 1986 dedicated 10 stalls to the Noble-Dawes House.

Mr. Harris also notes that the site plan does not show an accessible parking stall.

10. A memorandum received 3-6-01 from Bob Fielder regarding Fire Prevention and Life Safety Codes notes the result of the review as "Approved."
11. A memorandum of 3/5/01 from Charles Baker of Public Works notes that plans for the adjacent parking lot should be addressed in the application and without further information "Public Works can not approve this application as it stands alone." The approved site plan for the adjacent parking lot seems to address most of Mr. Baker's questions.

CONCLUSION: The applicant's request to fence his property is reasonable if viewed solely from the perspective of the landmark Noble-Dawes House, but LMC 27.63.400 also requires the City Council to consider (and the Planning Commission to offer advice upon) the impact of the proposal on the surrounding area, and the public benefit of granting the request. The impact of separating the lots, necessitating additional driveways and pavement while accommodating fewer parking stalls, seems to be adverse. However, those impacts come from implementation of an approved (and expired) building permit by a neighbor. While a joint operating agreement would be preferable to implementation of the applicant's proposal and reconstruction of the adjacent parking lot, the City cannot require neighbors to "just get along" and cooperate in the use of their property. Barring a joint operating agreement, there appears to be a public benefit of allowing the proposal and permit to be implemented as a step towards resolving the dispute.

STAFF RECOMMENDATION: Conditional approval.

CONDITIONS:

Site Specific:

1. After the applicant completes the following instructions and submits the revised plan to the Planning Department office, the application will be scheduled on the City Council's agenda.
 1. The site plan be revised to show:
 - (A) a handicapped accessible parking stall;
 - (B) a raised, curbed planting strip (turf or other low plantings) at least three feet wide for installation and protection of the fence; and
 - (C) a one-way circulation system, with angle parking within the lot, and reduction of the driveway width from 25' to 15'.

2. This approval increases the area of the Special Permit to include all of Lots 5 and 6, Block 150, Original Plat.

General:

3. The construction plans shall comply with the approved plans.

STANDARD CONDITIONS:

4. The following conditions are applicable to all requests:
 - 4.1 All privately-owned improvements shall be permanently maintained by the owner.
 - 4.2 This resolution's terms, conditions, and requirements bind and obligate the permittee, its successors and assigns.
 - 4.3 The City Clerk shall file a copy of the resolution approving the permit and the letter of acceptance with the Register of Deeds. The Permittee shall pay the recording fee in advance.

Prepared by:

Edward F. Zimmer, Ph.D.
Historic Preservation Planner

SPECIAL PERMIT NO. 1165B

PUBLIC HEARING BEFORE PLANNING COMMISSION:

March 21, 2001

Members present: Krieser, Duvall, Hunter, Taylor, Steward, Carlson, Newman and Bayer; Schwinn absent.

Planning staff recommendation: Conditional approval.

Ed Zimmer of the Planning Department submitted a letter in opposition received today and a revised staff recommendation with a revised memo from Public Works . The revised conditions of approval incorporate the Public Works statement that a revised site plan is needed to show how the ultimate landscaping might work and a one-way circulation system.

Proponents

1. Ray Lineweber, the applicant, made a presentation. He is requesting to expand the special permit for the historic preservation to include both lots at 13th & H Street. He realizes this appears to be somewhat controversial, but that controversy is fueled by those who have a problem that want him to have the same problem—their parking. He has let this go on longer than he should have. It started back in August of 1999. He agrees with the staff recommendation, as revised. The fence will be built the same as it is on the rest of the property. He will do angle parking and will make certain his tenants have sufficient parking, as they always have had. In the 16 years Lineweber has had this building, the tenants of Billy's have never had a parking problem. Even when the other building created a parking problem for Billy's, they were able to work through it. It is time to bring closure to a bad problem.

Lineweber confirmed that he is comfortable with the conditions of approval, as revised.

Opposition

1. Mark Hunzeker appeared on behalf of **Mark Becker**, the owner of the office building immediately to the east of the parking lot which is the subject of this application. It is important that the Commission pay particular attention to the procedural posture that this is really in. There was a City Council hearing relative to whether or not the existing special permit was in compliance with the conditions. Rather than order the revocation of that permit, the City Council just put it aside.

This is the problem—Special Permit 1165A requires 10 parking stalls for Billy's Restaurant. If it had not been for the special permit, Billy's Restaurant could not exist. Five of those 10 parking stalls are located on the lot in this request.

The parking lot is on the lot next to Billy's Restaurant and it covers most of Lot 5, which is part of this application, but also a significant portion of Lot 4. The existing pavement is included in a single parking lot. The problem is that there are about five stalls that were included in Billy's permit application. As it exists, the parking lot on Lot 5 is illegal because it was built originally under a permit

as an accessory use to the office building located on Lot 3. To the extent that it no longer is an accessory use to that building, the parking lot on Lot 5 is illegal because parking lots as a stand-alone use are not permitted in the O-1 district. This is a situation where a parking lot is illegal and is being added to the special permit for Billy's Restaurant in order to correct that deficiency. Hunzeker does not object to this aspect, but because it is illegal as a stand-alone use, the Billy's Restaurant permit is not in compliance with the existing conditions. Expansion is required to bring Billy's into compliance.

Hunzeker purports that the issue is whether the historic preservation special permit process should be used to a) bring Billy's into compliance with the requirements of the original special permit; and b) allow Lineweber to erect what amounts to a "spite" fence down his property line which will have an adverse impact on the abutting property and the general public.

Hunzeker suggested that the fence will prevent access to the parking which lies on the Becker property. To resolve that, Lineweber wants to put another curbcut on H Street, which eliminates 2 parking stalls on H Street; take out the front yard of his office building; take out several mature trees along the west side of his office building; and provide access to newly configured angle parking, which will effectively turn those stalls that already exist around and access them from the other way. It eliminates green space, trees, parking stalls on H Street and off the alley, and reduces the number of parking stalls – all for what? In order to permit Lineweber to build a fence that prevents Becker from having access to his parking stalls.

Hunzeker proposed an amendment to approve the expansion of the permit to include the parking lot to bring Billy's special permit into compliance, with two conditions:

- 1) eliminate the fence on the east property line, and
- 2) add a note that for so long as special permit in effect, or Lot 5 used as parking lot, grant owner of Lot 4 permission to use the driving aisle to access parking spaces on Lot 4; provided that permittee may require owner of Lot 4 to give written acknowledgment that use of Lot 5 for access to Lot 4 is permissive, shall never be construed as the grant of an easement, and shall cease upon termination of either SP.1165B or upon Lot 5 no longer being used as a parking lot, and require owner of Lot 4 to provide evidence of public liability insurance in an amount equal to that carried by permittee for Lot 5, and showing permittee as an additional insured on such policy.

Hunzeker believes this is a fair way to deal with this property. Lineweber has done a good job with Billy's. We're willing to allow the parking on Lot 4 to be used by Billy's after business hours. We're willing to participate in snow removal, which Becker has done this winter. But to use the city's historic preservation special permit process to commit this sort of aesthetic atrocity is really perverting the permit process. Taking out those trees and that yard so that we can have parallel opposing one-way

traffic ways for parking when it is unneeded and unnecessary, and when you have a special permit process that allows the flexibility, really makes no sense. This is a process that is necessary for Lineweber to bring his property into compliance and Hunzeker believes his proposed amendments are fair. His client is willing to work with the applicant on maintenance, etc.

If a fence had been on the property line when the building on Lot 3 was proposed and constructed in the historic district, Steward inquired whether there are any special characteristics that would result. Zimmer clarified that we are not dealing with a historic district but an original landmark. There was another property between the landmark and the former apartment building which is the office building.

Steward then posed the question about whether this is a routine parking requirement issue for this size, location and zone for an office building. It appears that it minimizes the parking that should be available to the tenants of this building and that if it were a free-standing proposal we would be requiring more parking. Zimmer advised that in the original special permit, the parking was for the uses at Billy's Restaurant (50% retail, 50% office) and the underlying zoning was R-8. The parking was discussed extensively in 1986 and the requirement of 10 parking stalls was part of that condition in 1986. Often parking in association with the landmark special permits is one of the trickiest issues because there is typically limited available land for the requested uses. The 10 was the number approved by Council in 1986.

Steward inquired about the parking that is remaining for use by the adjacent office building by this proposal. Are we ending up with the same spaces? Zimmer stated that we are not. The application involves Lots 5 and 6. You may look across the line to Lots 3 and 4 to the degree that this proposal impacts adjacent properties, but we are not looking at a unified proposal for Lots 3, 4, 5 and 6. Steward commented that the physical influence is on Lot 4 and he is trying to understand whether or not granting this, other than convenience, the curbcut and the trees, sets a precedence for an office parking relationship that we would not have approved otherwise. Zimmer would need to review the O-1 parking requirements. Ray Hill of Planning staff cited from the ordinance for O-1, which requires 1 parking space per 200 sq. ft. of floor area, but the parking may be located within 900 feet of the building, so that allows off-premise parking within 900' to meet the requirements.

Hunter observed that apparently the office complex had to be in some sort of compliance in order to get the use to begin with. Zimmer pointed out that the plan shown on page 75 of the agenda was approved in 1999 but was not implemented. With the conditions proposed today, we would be looking for some changes in the lots associated with Billy's.

Bayer asked whether there is any indication that approval of this action will allow the building on Lot 3 to get another special permit. Zimmer advised that the parking lot is not a special permit—it's a building permit by right.

Carlson observed that we have an apartment building converted to office. He is curious to know at what point they were forced to take access across Lot 5 in order to use that parking. Zimmer believes the parking lot was created in this configuration.

Rick Peo, City Law Department, did the research when this was before the City Council. It goes back a long ways. Billy's was to be rezoned to O-1 and that was met with opposition. They decided to make it R-8 zoning with a special permit for the historic structure for the restaurant. During that time, the owner of the apartment building was looking at putting in their own parking lot somewhat similar to what would be required now. But the two parties got together and worked out an agreement that Billy's and the apartment building would have a combined parking lot between them with a common curbcut. Subsequently, there was a change of ownership in the apartment building and the new owner believed the lease was too expensive. The lease was terminated but the new owner still wanted to access parking through Lineweber's property. The city is involved because it creates a nonconforming use. If the office doesn't want it and is not using it, how do you resolve the problem? A lot of the original contract agreements were hard to interpret as to intent. Peo could provide an in-depth historical analysis if given additional time.

Carlson asked whether Peo has knowledge that there was a contractual obligation involved. Peo knew that there was a lease arrangement at the time the parking lot was constructed.

Bayer wanted to know how the City can stop someone from putting a fence on their own property. Peo suggested that if the property is not used as a parking lot, Lineweber can do what he wants. The question here is that he desires to use the parking lot for Billy's and not allow the access drive to be used for the office building. Then the office building has to put in a new curbcut and use existing parking as a driving aisle. If Lineweber blocks off that parking arrangement that previously existed, there is an issue as to whether Billy's is in compliance with the special permit because that parking lot was designed in a certain manner.

Bayer posed the question: If the fence goes up, is the parking illegal? Peo advised that to be legal, the parking lot was to be with the apartment house, not Billy's. The original application did not show the parking lot for Billy's. They had parking to the south and then indicated a lease arrangement for parking on the parking lot to the east. By expanding the boundaries of the special permit to encompass that lot, the fence could be allowed.

Newman asked whether this is legal and feasible. Peo stated that he has mixed emotions on this question. He does not like the prospect of forcing someone to allow his property to be used for access without compensation. The only other reason he somewhat gives consideration is that the parking lot originally had a curbcut installed at that location to serve both properties. The builder of the apartment house took out the permit for the curbcut and he was not the owner of the property; the curbcut was granted; the parking lot was constructed; and we would imply that that was with the consent of Lineweber. We might have looked at it differently if we had known there was separate ownership of the building and the parking lot at the time the curbcut was requested.

Steward sought confirmation that the second curbcut has been approved but it has expired. Peo concurred. Steward observed then, if this action is approved, the office building property owner has to come back in for a renewal of that curbcut. If he chooses not to renew or delays it for an indefinite

period of time, or gets the approval and delays the actual construction, and Lineweber builds the fence, the owner of the office building has no access to his parking. What does the city do? Peo suggested that if there is no parking within 900' available, it would be unlawful. However, Peo pondered that he won't have tenants anyway if he doesn't have any parking so it might be a moot point.

Response by the Applicant

Lineweber suggested a two week deferral to attempt to reach some accord. Billy's has 10 stalls per the special permit plus 23 stalls. He leases 10 stalls to the building on Lot 3. He had no intention to build a parking lot. He wants to be a good and generous person but he has been milked for too long. If he cannot reach an agreement he fully intends to build the fence. He had a lease; he received a letter on 8/27/99 from the apartment building owner saying he no longer needed Lineweber's parking.

Hunter clarified with Lineweber that he does not need 23 stalls. Lineweber agreed. Hunter suggested that the issue is someone paying the appropriate amount for rental of the parking stalls or the fence goes up. Lineweber responded that for two years he has tried to get the owner to recognize that he has to pay for the use of Lineweber's property.

With regard to the parking stalls, Lineweber clarified that there are 16 stalls on Lot 4, which are accessed by driving across Lineweber's property and some of them hang over on Lineweber's property. There are a total of 32 parking spaces on Lot 5 and part of Lot 4. The property line is at the east edge of the driveway. Lineweber now leases 10 spaces to other tenants. Previously, he leased the entire lot and 10 stalls were left for Billy's to comply with the conditions of the permit. Lineweber has plenty of stalls to comply with the permit.

Bayer clarified the issue. Lineweber is putting up the fence. But to reach an accord means that the owner or tenants of the building agree to some lease arrangement with Lineweber as the owner of the property. Lineweber agreed.

Carlson moved to defer two weeks, seconded by Taylor.

Hunter has a problem deferring it because with ongoing negotiations that have been going on for a year and a half, it's her understanding now that the hammer is real close to coming down. Maybe it's not an option to negotiate anymore. It is going to be difficult to say no to any amount if you are going to keep the spaces.

Steward pointed out that the property owner brought the proposal forward. If the owner is asking for a delay he believes we owe him that right. Steward is bothered by the potential loss of landscape. There are some very mature trees in this neighborhood; he is bothered by the second curbcut but he would defend the property owner's right to do what is appropriate to his property. If this were two adjacent residences, we would not give it ten minutes. Let's see if it can't be worked out one last time.

Motion to defer two weeks, with continued public hearing and administrative action scheduled for April 4, 2001, carried 7-1: Krieser, Duvall, Taylor, Steward, Carlson, Newman and Bayer voting 'yes'; Hunter voting 'no'; Schwinn absent.

CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn; Bayer and Duvall absent.

Ed Zimmer of Planning staff advised that he has been in contact with both the applicant and the adjacent owner. He does not see any progress being made to resolve this item. He has also seen draft revisions to the plan as called for by the conditions of approval in the staff report.

Proponents

1. Ray Lineweber, the applicant, concurred with Mr. Zimmer. He does not support any amendments from the opposing side; there is no easement on his property, Lot 5; there is no contract on Lot 5; and this is not about Lot 4—it is about Lot 5. Lineweber stated that he will comply with the recommendations of the Planning staff and will construct the fence and redesign the lot accordingly.

Lineweber noted that there have been concerns about loss of the mature trees on Lot 4, but he pointed out that just to the west of his property on Lot 6 we lost a big locust tree last week. Lineweber indicated that he will spade in two of the four trees where the locust tree was lost; and the others will go into the medians on Stratford, so the trees will not be lost. They will be spaded in elsewhere.

Hunter asked Lineweber specifically whether there was ever any understanding of exchanging the parking stalls with that building when he received the special permit. Lineweber stated that it is a bit vague—all he can relate is what the lease provided. Hunter then asked, "when you went for the special permit, were you granted that permit with an understanding that that lot would be used between both buildings?" Lineweber believes they were granted the special permit based on the conditions of a lease. The lease was attached to the permit.

Opposition

1. Mark Hunzeker appeared on behalf of **Mark Becker**, the owner of the Capitol Park Office Building adjacent to the parking lot in question on Lot 5. At the last hearing there was some discussion after the hearing that indicated some misunderstanding about parking requirements and some of the economics of this transaction. Hunzeker purports that it is not the Planning Commission's responsibility to determine who is right and wrong, reasonable or unreasonable. The parking requirements for the office building are 1 per 1200 sq. ft. of office space. There is more than enough parking on the Capitol Park side of the property line in order for that property to meet the zoning requirements. This is not an issue of whether or not the office building will be in compliance.

There was some speculation in the discussion that Becker was simply unwilling or too stubborn to pay the rent necessary to get the parking that he was trying to get. The original lease contained a series of escalators in the original amount for the leasing of parking spaces. By the time Becker bought the property, the escalators had reached a point where the individual parking stalls were leased for \$150 per month per stall. That is roughly three times or more the market rent for parking in this part of town. Escalators are built in by people who don't have any idea what the future may hold and to protect against some unreasonable changes in economic circumstances, but they are routinely renegotiated if they get out of whack. Hunzeker believes this is a situation where they are way out of whack. Lineweber is leasing some spaces to the office building tenants for \$50.00 per month.

Hunzeker then reviewed a proposal for two or three alternatives that his client has submitted to the applicant. This is not a situation where the Planning Commission should be trying to decide which of these people are being reasonable or unreasonable, but it is the Commission's job to deal with the special permit process. This is a special permit application which is needed by Lineweber to legitimately and legally maintain the Billy's Restaurant use of the property, and he is proposing as part of that to literally erect a "spite" fence. Part of the reason the Commission is here is to administer that special permit process in a way not to damage abutting property or the surrounding area. There needs to be some consideration of the four mature trees and some adjustment made.

Hunzeker re-submitted the proposed amendments to the conditions of approval that he submitted at the last meeting, giving the owner of Lot 4 permissive use of the driving aisle to access parking spaces on Lot 4. The Commission needs to do something consistent with the use by both properties, and not just put the Lineweber property into compliance with the special permit.

Taylor asked whether Hunzeker is suggesting that what Lineweber is charging for parking spaces is exorbitant. Hunzeker does not know the right number, but you can lease all the parking you want in this part of town for \$50.00/month per stall. There was an agreement which ran it up to \$150.00/mo. per stall. Becker determined that to be excessive and terminated the lease, and they have since been fighting over access. Hunzeker believes all the circumstances that surrounded the demolition of the building that was on this parking lot, the construction of the parking lot and the maintenance for the last 15 years all indicate that the owner of that apartment building at the time thought he was going to have access to his parking. The special permit is seeking permission to put up a "spite" fence and cause Becker to tear down trees and put concrete in one of the few remaining areas of green space. It would also eliminate about 7 parking stalls, all of which is to the detriment of the entire area.

Taylor wondered whether people have been parking there for free in the meantime. Hunzeker stated no, there are people who are leasing spaces from Lineweber that are tenants of Becker's building. All Becker needs is access to the parking stalls that are on the Becker property.

2. David Hunter, President of State Title Services, testified in opposition. He was one of the original owners of the property back in 1986. When he developed that building, there was a lot of good faith negotiations with the city and with Lineweber. The Dawes house was on the corner (now Billy's), and the apartment building was there (now Capitol Park). There were also a couple "real beaters" sitting there that were close to being red-tagged. The agreement negotiated with Lineweber at the time was to tear down the property; put the parking lot in conformance ("we" paid all the expenses to

tear down the building, to maintain the parking lot and to pave the parking lot, plus \$13,000 rent for the privilege of using the parking lot we put in and paid for). There was one curbcut approved by the city. There is a letter signed by Ray Hill which indicates that the parking lot lease agreement was approved by the city, and that the Planning Department be contacted if there is any change in the lease arrangement. Hunter purports that there was a requirement for the lease. This was a 10-year lease with multiple 5-year options. There were no specific calculations for escalators. What took place was a built-in "imagination" of escalators. What is taking place here, if the curbcut is denied, all of the trees in front of the building (Capitol Park) and the parking will be right up against the building with two curbcuts. If this special permit is granted, it will look like a disaster zone. The Planning Commission is being used as a pawn to escalate the civil negotiation to a different level. Hunter has no financial interest in this. If he had this lease to write over, he would have done so. We made some errors. There was some handshaking that went on. The one word "perpetual easement" should have been in the lease for the driveway and curbcut. We assumed that nothing would change. There is some potential civil litigation that there may be an implied or prescriptive easement. Hunter encouraged the Commission to not approve the extension of this special permit abutting up to the other building. There was a reason the city wanted us to negotiate. Lineweber is currently receiving \$50 /mo. per stall and he wants an additional amount for ingress and egress.

In addition, Hunter believes another issue is that the lease clearly states that Lineweber has to sell and convey the improvements of this property and this has not occurred. Let the parties negotiate it from a civil perspective. The Commission should not get involved.

Response by the Applicant

Lineweber stated that he is not asking for \$1500 for them to have access each month. They leased the entire lot when they originally did the parking lot. In that lease there were clear instructions that they would obtain all the permits and tear down the buildings, and for that he received monthly rental payments. Still, it is a cost of doing business and they don't want to accept it. It is a matter of doing the right thing. Lineweber does not believe he has ever done a project that has become a disaster area. Lineweber wants 2 ½ ' for low shrubs and perennials rather than no setback. The wrought iron fence will be the same that is there and will give the property its own definition. The bottom line is that it is his property and all he wants people to do is respect that.

With regard to David Hunter's comments, Lineweber indicated that he has done a traffic study on the number of stalls that are actually needed for the restaurant, the result of which indicates he has sufficient parking. The tenants of the office building came forward to rent the stalls after the lease was terminated. They did not use any of the stalls on Lot 4 during the period he did the traffic study and he had sufficient parking.

Lineweber is concerned about the \$150/mo. per stall allegation. He does not know who is figuring that. That is completely out of line. If indeed they were to lease the entire lot today, they would get the entire lot with 13 stalls. That does not equate to \$150/mo. per stall. Lineweber challenged the Commission to please consider his petition to amend the special permit rather than the Becker dilemma. He believes the fence will look very, very nice there.

Staff questions

Newman asked for clarification as to exactly what the Commission is voting to do. Is it to extend the line of the historic property? Does that mean the parking lot will remain as is, or that he is required to dig up half the parking lot? Ed Zimmer of Planning staff clarified that the application is to extend the special permit to include all of Lot 5. Presently it includes Lot 6 and a sliver of Lot 5. All of the Lineweber property would be under the special permit if this application is approved. The site plan for the new expanded property is to reconfigure the parking lot on his property and construct the fence. If the special permit is approved, the applicant can then do what the special permit site plan allows, and that is why we began the process with the Historic Preservation Commission which is charged to look at appropriateness of historic property.

Steward observed that the applicant can do what the site plan permits or he can do nothing. Zimmer believes that the special permit has a condition of implementing the site plan. Under the typical conditions, the permittee is required to carry out the special permit and the site plan is part of the conditions attached to the approval. He does not believe it is optional.

Rick Peo of the City Law Department clarified that Lineweber had two options. He could have just expanded the boundaries of the permit for Billy's to include the present parking lot, but he chose to go beyond that and proposed a new arrangement for parking to allow him to install a barrier fence along the east property line. That was at the staff's direction in prior meetings regarding the self-help efforts of putting up the fence. We ask people to conform to the site plan. If he proposes an altered parking arrangement and a fence, we would expect him to do that or come back and amend the special permit again.

Assuming that some circumstance of fate of powers larger than our own would cause this issue to be settled, Steward wondered whether the permittee has to come back. Peo observed that part of the conditions of the special permit is signing a letter of acceptance. If the permittee did not accept, he would be back in the same situation he is today. If he takes advantage of it, then he would have to come back and amend in order to do something else.

Carlson inquired whether the Planning Commission has any latitude to modify the request as to the boundary. Peo believes that the Commission could approve less than what was requested, i.e. just to expand the dimensions to include all of Lot 5 with Lot 6. Carlson wondered whether the applicant would then have to come back to ask for further site modifications. Peo believes that the parking lot arrangements and driveways could be handled administratively rather than through this body. The fence issue is tough. Theoretically, a property owner has a right to put up a fence. The reason we would not allow the fence before was because it was a shared parking arrangement that got approved and the special permit did not cover that lot.

Hunter noted that a special permit is a special request for a use. When this special permit was originally granted, the parking that exists was sufficient for that restaurant. Zimmer clarified that this is the second amendment to the original special permit. The original permit was to allow a certain increased amount of commercial use in the R-8 zoning. That amendment allowed the restaurant use.

In 1986, when the restaurant use was granted, the permit stated that 10 stalls should be provided for that use and 5 stalls could be by lease. It did not attach to a specific plan. It only regulated Lot 6. Hunter believes there are more than 10 spaces. Zimmer agreed that there are 5 in the back and 15 on each side of the aisle. Hunter does not believe there is a need to amend the special permit for additional parking. The existing special permit is valid for the property and valid for the use. She does not believe Lineweber is doing this because he needs more parking. Zimmer suggested that it is about regularizing the parking on Lot 5, which is zoned O-1. To attach the parking clearly to the restaurant is the purpose of extending the special permit to cover Lot 5.

Realistically, Hunter believes that there is probably a lot of option for interpretation in a court setting. She wonders whether the Planning Commission isn't being placed in the position of making a decision that probably would get litigated to an end that was really based on legal documents that were executed. Peo does not believe the Planning Commission action will affect the private legal actions that they might bring. The purpose of this action is that Lot 5 has a different zoning than Lot 6. When they came in to put Billy's in, they showed 10 parking stalls. The 5 parking stalls on the east were under a different zoning district. We were not aware of the ownership at the time. The city made it a condition of the special permit that if the permittee was going to show those 10 required parking stalls, with 5 on property under a lease arrangement, then the city wanted to see the lease. We all assumed that it was owned by the office building rather than Billy's. By the nature of the parking lot being in a different zoning district, it is only accessory to an O-1 use. To make the parking accessory to Billy's Restaurant use, it was determined that historic preservation is allowed in O-1 and the owner needed to expand the boundaries of the permit to pick up the O-1. That makes Billy's legal. The city was being pushed to be for one side or the other. We are trying to not do that. We are just trying to say to the applicant that he cannot just do self-help. If he wants to be legal he has to expand the boundaries of his special permit, and that is what this application is about. The city wants to stay out of a legal battle.

Hunter believes that litigation could negate the permit. Peo believes the person could have fought the lease agreement without terminating it.

Newman clarified that if the Commission does not approve this application, Lineweber cannot use the property that he owns as a parking lot, although he can still put up the fence. Peo concurred. He could close down that lot and then he could put up the fence.

Public hearing was closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Hunter moved to deny, seconded by Newman.

Hunter believes this whole situation is so legal bound. It will probably wind up in court no matter which way it goes. By expanding the special permit, it probably will wind up with someone determining the intent.

Newman believes that denying the special permit maintains the status quo and the negotiations will continue.

Steward believes this Commission will be making a mistake by not supporting the staff recommendation because it is a property rights issue; the individual has the right to make this request and has the right to propose the work and to expand the historic district; he does not believe the speculation about the legalities has anything to do with the responsibility and decision to be made by this body. As long as this is within the support and domain of the Comprehensive Plan--that the property owner has the right to the request and that it is justified and has been properly researched and supported by the staff--it seems the Commission is compelled to support the staff recommendation. He finds it extremely interesting that the opponents would use aesthetics and environmental issues to make a case when the same voices have been heard on the other side of the issue making a case against the environmental and aesthetics. For Steward, this is clearly a right and it is in fact a dispute that should not be taking place and that the Commission should not get involved in. The Comprehensive Plan supports this recommendation.

Carlson agreed with Steward. We have approval by the Historic Preservation Commission and a logical conclusion in the staff report.

Newman's problem with it is the green space next to the office building. She believes it is very attractive as it is. When she sees expanding concrete she does not like it and that is what will happen with this approval. Her concerns are the aesthetics.

Taylor commented that Lineweber has a compelling argument and he definitely thinks in this case that the staff recommendation appears to be appropriate and in compliance. Taylor agreed with Steward's comments.

Hunter stated that the whole reason for her motion to deny is that basically, this special permit was awarded based on a lease agreement with another property owner to share parking. And the lease still exists. If someone wants the lease not to exist or vice versa, consequently you wind up at this point. The owner's property rights were exercised when they did the special permit the first time with the agreement to do the lease arrangement with the other building that needs the parking. All of a sudden the rules are now changed. And the changing of those rules affects the original agreement.

Steward called the question.

Motion to deny failed 4-3: Krieser, Hunter, Newman and Schwinn voting 'yes'; Carlson, Steward and Taylor voting 'no'; Bayer and Duvall absent.

Steward moved to approve the staff recommendation of conditional approval, seconded by Taylor. Motion failed 3-4: Carlson, Steward and Taylor voting 'yes'; Krieser, Hunter, Newman and Schwinn voting 'no'; Bayer and Duvall absent.

This item is held over for administrative action only at the next meeting of the Planning Commission on April 18, 2001. Public hearing is closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 18, 2001

Members present: Krieser, Carlson, Schwinn, Steward, Newman, Taylor, Duvall and Bayer; Hunter absent.

Steward moved to approve the Planning staff recommendation of conditional, as revised, seconded by Carlson.

Duvall thinks it is ridiculous that we are using this forum to negotiate this dispute.

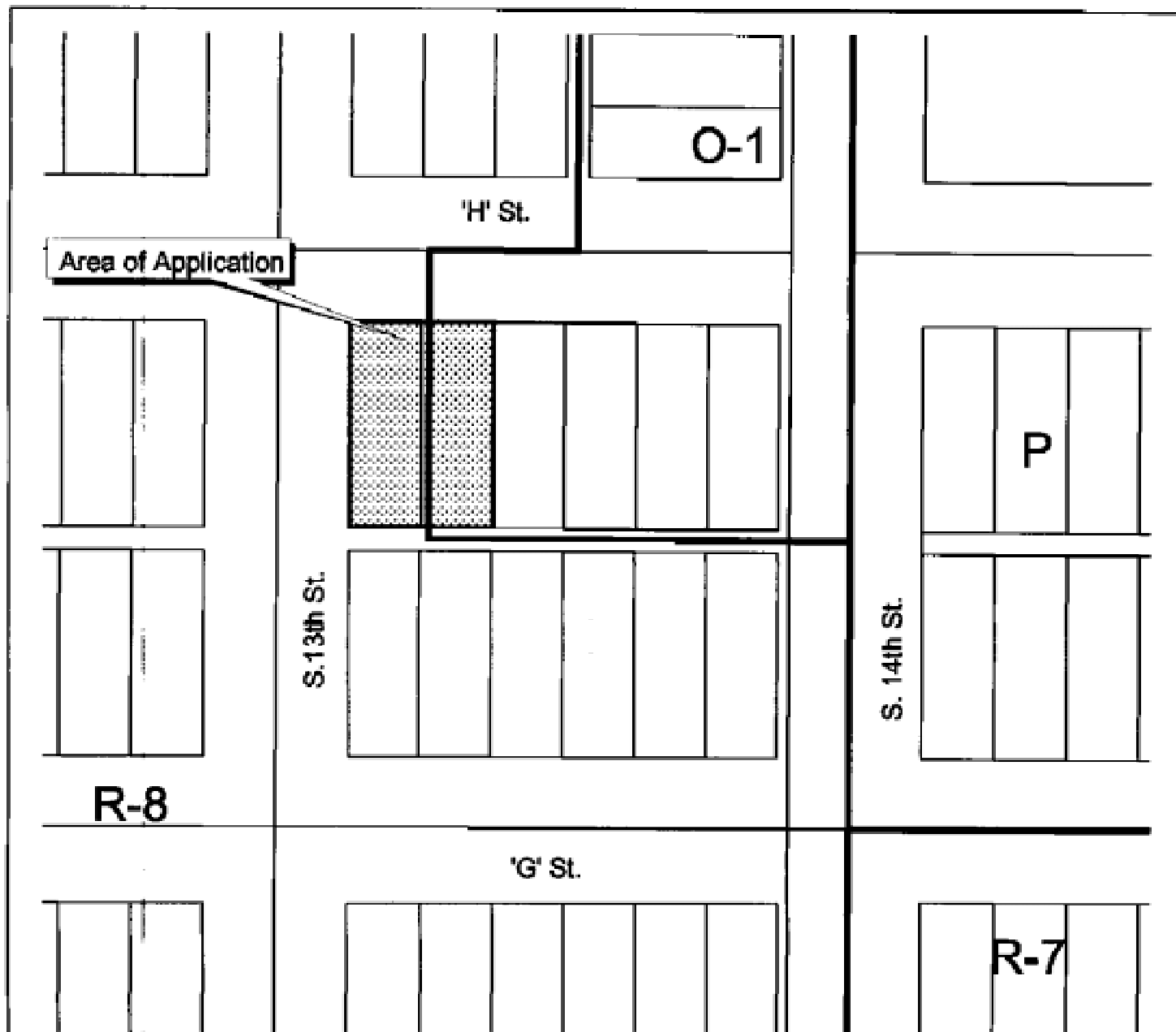
Steward does not believe we are negotiating a dispute between neighbors. We have a property owner that has made a legitimate request and Steward believes he has every right to make this request. Steward does not see how we can be consistent in our behavior by simply saying this is a personal dispute. Steward stated that he wanted to take sides with the process and the Comprehensive Plan. Whether he feels that it is a dispute or that there are ill feelings created by the request is not something he wants to sit in judgment of. The trees that have come into question in front of the adjacent building he believes are movable and he also believes that if the property owner to the west plants in that strip with the fence as he indicated in his testimony, there will be better shade for cars regardless of where they are parked in that parking lot and the environment will not be damaged in the net consequence.

Taylor agreed with Steward.

Bayer is having a tough time with this because it comes down to property rights. Does the neighbor to the east also have property rights that are involved in this situation, based on some agreement, whether written or verbal? Bayer believes there are two owners involved here, both with some property rights.

Motion for conditional approval, as revised, failed 3-5: Carlson, Steward and Taylor voting 'yes'; Krieser, Schwinn, Newman, Duvall and Bayer voting 'no'; Hunter absent.

Schwinn moved to deny, seconded by Duvall and carried 5-3: Krieser, Schwinn, Newman, Duvall and Bayer voting 'yes'; Carlson, Steward and Taylor voting 'no'; Hunter absent.

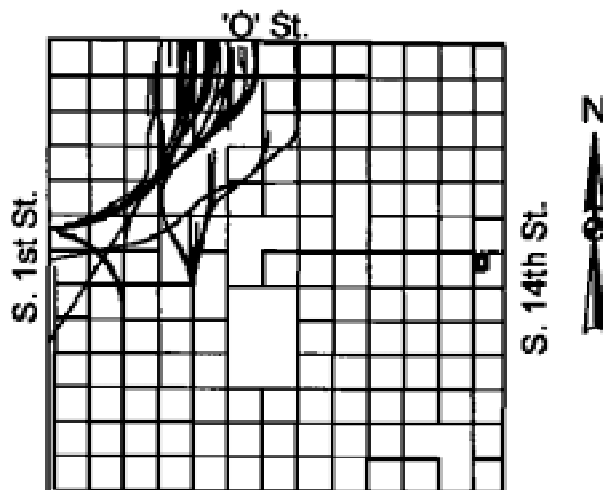
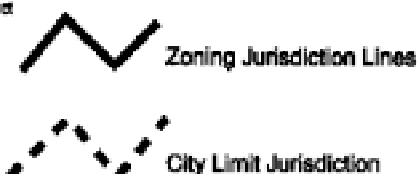


Special Permit #1165B **S. 13th & 'H' St.**

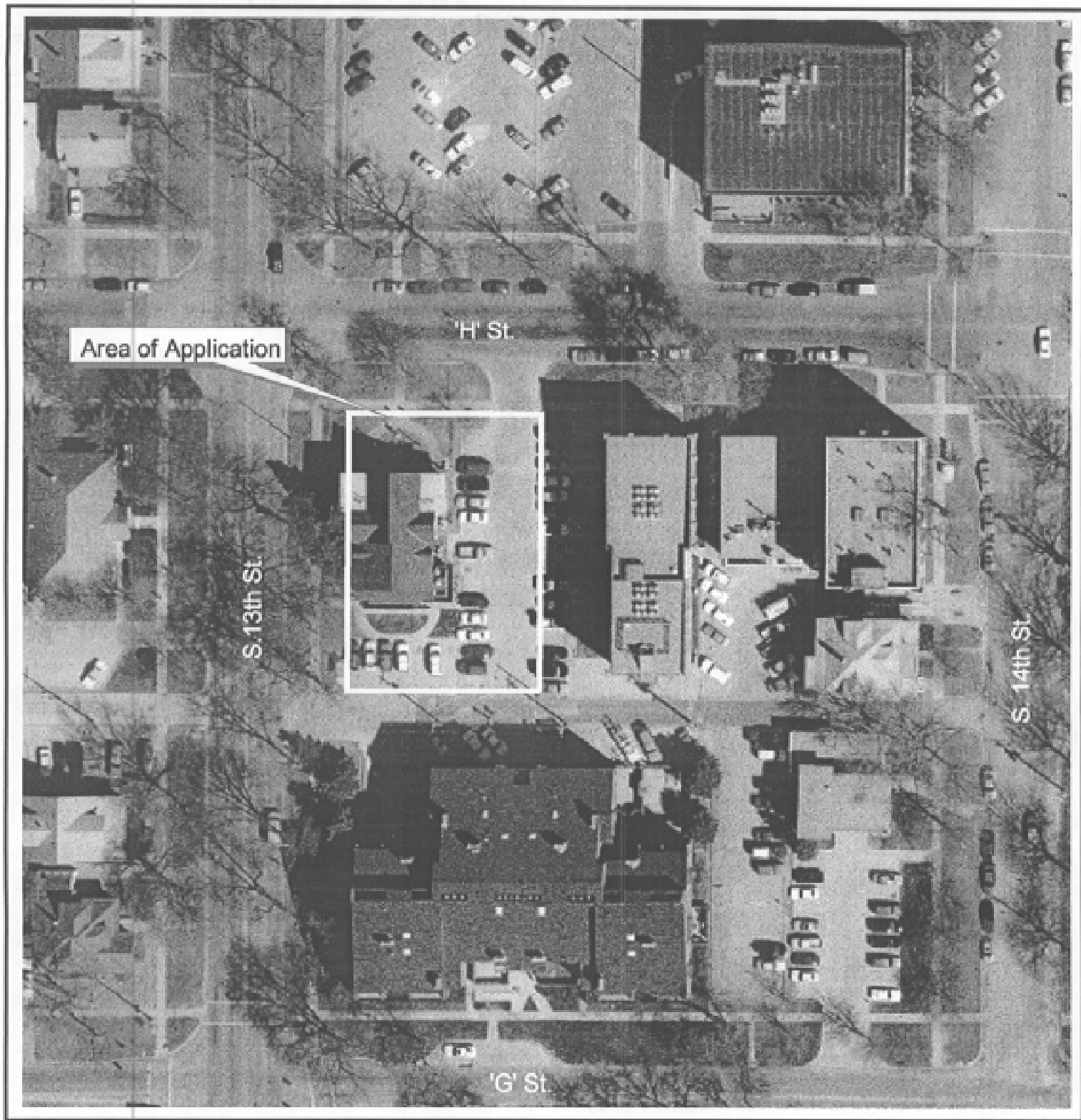
Zoning:

R-1 to R-4	Residential District
AG	Agricultural District
AGR	Agricultural Residential District
R-C	Residential Conservation District
O-1	Office District
O-2	Suburban Office District
O-3	Office Park District
R-T	Residential Transition District
B-1	Local Business District
B-2	Planned Neighborhood Business District
B-3	Commercial District
B-4	Lincoln Center Business District
B-5	Planned Regional Business District
H-1	Interstate Commercial District
H-2	Highway Business District
H-3	Highway Commercial District
H-4	General Commercial District
I-1	Industrial District
I-2	Industrial Park District
I-3	Employment Center District
P	Public Use District

One Square Mile
 Sec. 26 T10N R6E



'A' St.
 Sheet 1 of 2
 Date: 019
 Lincoln City - Lancaster County Planning Dept.



Special Permit #1165B
S. 13th & 'H' St.



Sheet 2 of 2

Date: _____

Photograph Date: 1997

020

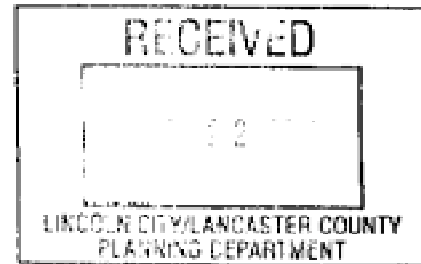
Lincoln City - Lancaster County Planning Dept.

2942 Stratford Avenue
Lincoln, Nebraska
68502

February 22, 2001

Ms. Kathleen A. Sellman, Director
Lincoln-Lancaster County Planning Department
555 South 10th Street
Suite 213
Lincoln, Nebraska

68508



Re: Amendment to Special Permit #1165A

Dear Director Sellman:

Please accept the attached materials and the filing fee as the necessary provisions to place my proposal to amend Special Permit #1165A on the agenda of the City-County Planning Commission on March 20, 2001.

I stopped by yesterday, and your kind professionals were most helpful in providing the necessary guidance to assist me with the compilation of materials.

Mr. Ed Zimmer, a Senior Planner, with the Planning Department, and the Historic Preservation Commission members acted, on my proposal, as their minutes will verify, on February 15, 2001, with a favorable vote of 5-0 to advance the same.

I am hopeful the planning department concurs with my proposal. I know there has been some degree of contact from tenants of a neighboring building, concerned about sufficient parking space. However, I have a written instrument from the building owners in which they state: **"We have made other arrangements for our tenant parking , and will not require your portion of the lot in the future."** If indeed planning is concerned about ample parking for that multi-story structure, I would suggest they visit with the owners of that. Some of their clients do rent from me, but I am certain there have been no letters of concern, from them to planning or the City Council.

The attachments are identified as follows:

- 1) An 8 ½" x 11" site plan which includes a copy of "the plan" filed in 1986. This amendment merely extends the Special Permit to the property line and provides for an installation of a wrought iron fence.
- 2) An elevation of the proposed fence. I have purchased some in Omaha identical to the existing fence.
- 3) The original landscape plan is included, and I have committed to Historic Preservation to add vegetation for screening purposes when the fence is installed.
- 4) A certificate of ownership.

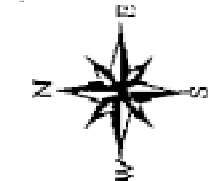
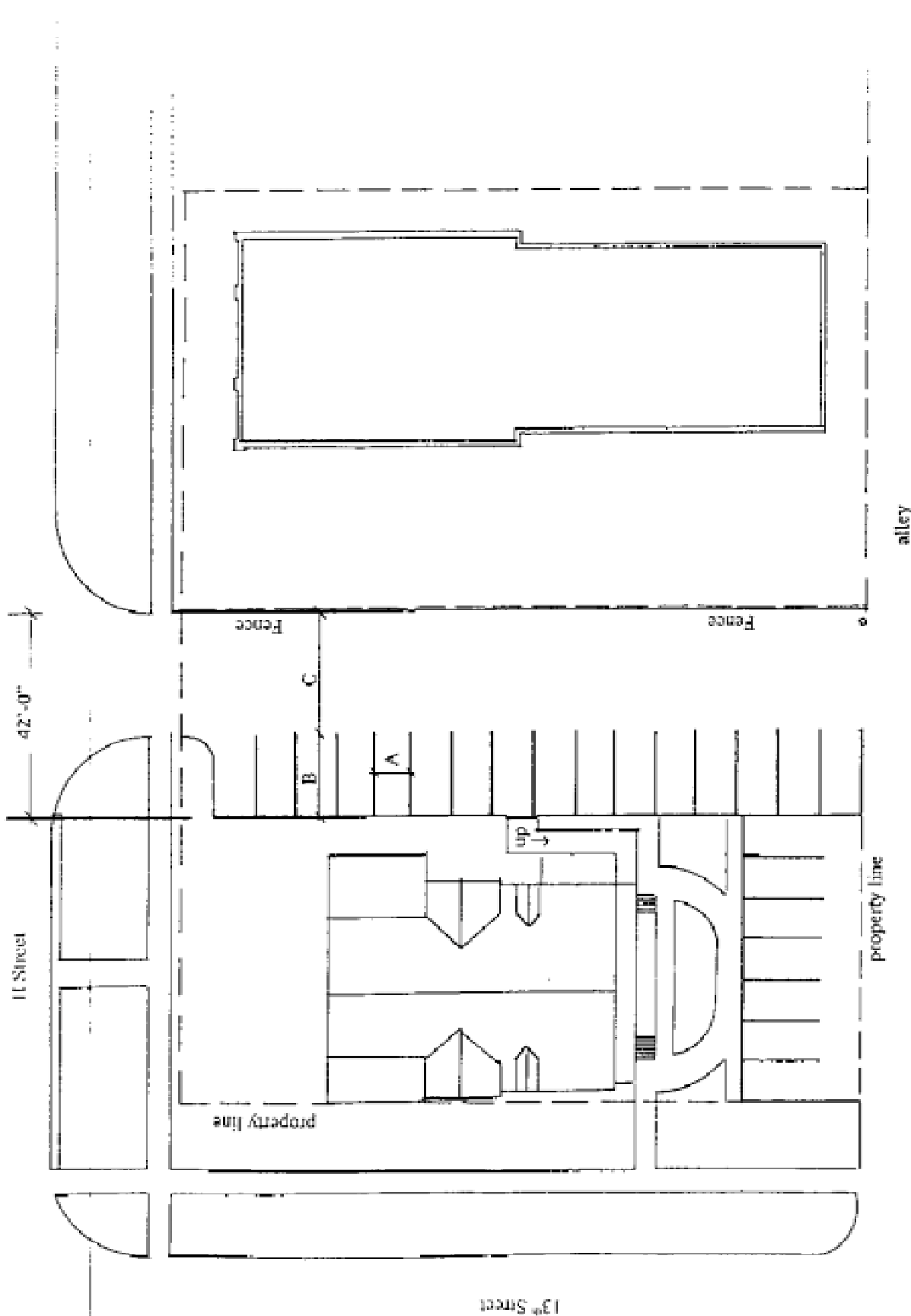
Thank you for your consideration of this material to permit the amendment of Special Permit #1165 A.

Respectfully,

A handwritten signature in black ink, appearing to read "Ray Lineweber". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ray Lineweber

attachments



Legend

- "A" = 8'-6" stall width
- "B" = 17'-6" stall depth
- "C" = 24'-0" aisle width

Ray Lineweber Parking Lot Redesign



Scale: 1 inch = 30 Feet

024

